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SONY MUSIC ENTERTAINMENT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

SONY MUSIC ENTERTAINMENT, a Delaware General Partnership, Plaintiff, vs. APPLEBEE'S SERVICES, INC., a Kansas corporation; and DOES 1 through 10, inclusive, Defendants.	Case No. 2:17-cv-3243 COMPLAINT FOR BREACH OF CONTRACT; AND DIRECT, CONTRIBUTORY AND VICARIOUS COPYRIGHT INFRINGEMENT DEMAND FOR JURY TRIAL

Plaintiff Sony Music Entertainment ("Sony Music") alleges:

JURISDICTION AND VENUE

1. The Court has jurisdiction of this action pursuant to:

(a) 28 U.S.C. § 1332, insofar as the amount in controversy exceeds the sum of $75,000, exclusive of interest and costs, and there is complete diversity between plaintiff, on the one hand, and the named defendant, on the other hand; and, alternatively,

(b) 28 U.S.C. §§ 1331 and 1338(a), insofar as it arises under the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.*, 28 U.S.C. § 1367, and the non-copyright claims are so related to the copyright claim that they form part of the same case or controversy.

2. Venue is proper in this District under 28 U.S.C. § 1391(b), insofar as at least one defendant resides in this District or, alternatively, under 28 U.S.C. § 1391(b), insofar as a substantial part of the events or omissions giving rise to the claims occurred in this District, or, alternatively, under 28 U.S.C. §§ 1391(b) or 1400, insofar as at least one defendant may be found here.

THE PARTIES

3. Sony Music is a Delaware general partnership with its principal place of business in the State of New York, and whose two partners are:

(a) Sony Music Holdings Inc., which is a Delaware corporation with its principal place of business in the State of New York; and

(b) USCO Sub LLC, which is a Delaware limited liability company with its principal place of business in the State of New York, and whose sole member is Sony Music Holdings Inc., a Delaware corporation with its principal place of business in the State of New York.

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4. Sony Music is informed and believes, and upon that basis alleges, that defendant Applebee's Services, Inc. ("Applebee's Services") is a Kansas corporation with its principal place of business in Glendale, California.

5. Sony Music is presently unaware of the true names and/or the involvement of the defendants sued herein by the fictitious designations does 1-10, and for that reason sues them by those designations. Sony Music will seek leave of Court to amend this pleading to identify those defendants when their true names and involvement in the infringements hereinafter described are known.

FACTS COMMON TO ALL CLAIMS FOR RELIEF

6. Sony Music is a record company and is the owner or exclusive United States licensee of sound recordings containing the performances of some of the most popular and successful recording artists of all time. Sony Music has invested and continues to invest significant money, time, effort and creative talent to create, promote, sell and license its sound recordings.

7. Sony Music is, and has been at all relevant times, the exclusive licensee of the rights, including copyright rights, in the United States and elsewhere, to the sound recording titled *Rock and Roll Ain't Noise Pollution* ("*Rock and Roll*") by the musical group AC/DC. The United States Register of Copyrights has issued to Sony Music's licensor, Leidseplein Presse, B.V., Registration Certificate SR 019-392, dated August 4, 1980, for the sound recording copyright in, *inter alia*, the sound recording *Rock and Roll*.

8. Sony Music owns, and has owned at all relevant times, the copyright in the recording titled *Gonna Make You Sweat (Everybody Dance Now)* ("*Everybody Dance Now*") by the musical group C+C Music Factory. The United States Register of Copyright has issued to Sony Music Registration Certificate SR 782-730, dated March 3, 2017, for the sound recording copyright in *Everybody Dance Now*.

9. Due to their bulk, copies of the sound recordings *Rock and Roll* and *Everybody Dance Now* (the "Recordings") are not attached to this Complaint.

10. The exploitation of sound recordings of musical performances can include issuing non-exclusive licenses for the use of sound recordings, or portions of them, in motion pictures, televisions shows, commercials and other audiovisual productions. Obtaining the rights to use a sound recording of a musical performance generally requires obtaining a license from the owner of the sound recording and obtaining a license from the owner or owners of the musical composition embodied in the sound recording. Those seeking licenses often engage music clearance companies who, on their behalf, identify the companies that own or control the sound recordings and musical compositions and then contact those companies to solicit quotes of license terms for the desired uses.

11. Generally, the license fee paid for the use of a sound recording is the same amount as the license fee paid for the use of the musical composition embodied in the sound recording. Accordingly, licenses for the use of a sound recording typically provide that the license fee is "MFN" or "most-favored nations," in that the license fee is the greater of (1) the license fee specified for the use of the sound recording and (2) the license fee paid for the use of the musical composition.

12. In or about February 2016, Sony Music was contacted by a music clearance company, Music Dealers LLC ("Music Dealers"), which sought from Sony Music non-exclusive licenses to use portions of the Recordings in commercials advertising Applebee's Restaurants. In the course of those discussions, Music Dealers represented to Sony Music that an advertising agency, Barkley Inc. ("Barkley"), was working with Music Dealers in obtaining licenses to use sound recordings in commercials advertising Applebee's Restaurants, and that both Music Dealers and Barkley were acting as agents of defendant Applebee's Services in seeking from Sony Music licenses to use the Recordings in those commercials.

13. In response to Music Dealers' inquiries, Sony Music provided to Music Dealers quotes proposing the terms that Sony Music would accept for the non-exclusive licenses that Music Dealers sought for the use of the Recordings in

commercials advertising Applebee's Restaurants. The terms that Sony Music proposed and which Music Dealers advised were acceptable for Sony Music's non-exclusive license of the requested rights to use the Recordings in commercials for Applebee's Restaurants, include:

(a) the payment to Sony Music of the greater of (i) $250,000 and (ii) the amount paid to music publishers for the right to use the musical composition *Rock and Roll*, with Applebee's Services obligated to promptly notify Sony Music if an amount greater than $250,000 was paid for the use of the musical composition *Rock and Roll*; and

(b) the payment to Sony Music of the greater of (i) $50,000 and (ii) the amount paid to music publishers for the right to use the musical composition *Everybody Dance Now*, with Applebee's Services obligated to promptly notify Sony Music if an amount greater than $50,000 was paid for the use of the musical composition *Everybody Dance Now*.

14. In or about February 2016, Music Dealers informed Sony Music that the terms were acceptable, including the foregoing payments to Sony Music, and requested that Sony Music provide written licenses for review and comment.

15. Pursuant to Music Dealers' requests, Sony Music provided for review and comment written licenses of the requested rights for Applebee's Services to use the Recordings, and Music Dealers provided comments, including comments that Music Dealers advised Sony Music had been provided by Barkley. Ultimately, the written license prepared for the use of the sound recording *Rock and Roll* (the "*Rock and Roll* License") and the written license prepared for the use of the sound recording *Everybody Dance Now* (the "*Everybody Dance Now* License"), both of which were approved by Music Dealers and, Music Dealers advised, by Barkley, were directed to Barkley "on behalf of Applebee's Services, Inc.," and included a place for Barkley to sign "as agent for APPLEBEE'S SERVICES, INC."

16. Commercials advertising Applebee's Restaurants and incorporating substantial portions of the Recordings were produced and released to the public.

17. The commercials' use of the Recordings garnered a great deal of attention. By way of example, only, the Applebee's Restaurant commercials using *Rock and Roll* promoted what Applebee's Services – quoting its Chief Executive Officer, Julia A. Stewart, on Applebee's Services' website and in Applebee's Services' official press release – described as "a transformation of Applebee's" by the addition of new menu items for sale to the public at "nearly 2,000 of its U.S. restaurants." The use of the Recordings in the commercials bears a causal relationship with the revenues of the Applebee's Restaurants and, for example, Applebee's Service's website and official press release also state that "[t]he appeal of the spots is further fueled by iconic rock music, including AC/DC's signature 'Rock 'n' Roll Ain't Noise Pollution.'"

18. Despite defendants' use of the Recordings to defendants' great profit, and despite Sony Music's repeated oral and written requests, the written licenses provided by Sony Music have never been signed and returned to Sony Music and neither the agreed payments nor any portion thereof have ever been paid to Sony Music.

19. Instead, Applebee's Services and Barkley have refused to pay the license fees to Sony Music, claiming that they paid them to Music Dealers, that Music Dealers was acting as Sony Music's agent and that Music Dealers has gone out of business.

20. Applebee's Services' claim that Music Dealers was acting as Sony Music's agent is pure fiction: among other things, Music Dealers was a music clearance company and was engaged by Applebee's Services, directly or through Barkley, to obtain licenses on Applebee's Services' behalf; the two licenses that Music Dealers sought from Sony Music were only some of the licenses that Music Dealers sought from other record and music publishing companies on Applebee's

Services' behalf; Music Dealers and Barkley represented that they were acting on behalf of Applebee's Services; and Music Dealers' fees for its services were paid by Applebee's Services, directly or through Barkley, not by Sony Music.

21. In short, Applebee's Services' excuse for not paying Sony Music for the Recordings used in the commercials for Applebee's Restaurants is baseless, contrived and in bad faith.

FIRST CLAIM FOR RELIEF

(For Breach of Contract – The *Rock and Roll* License)

(Against Defendant Applebee's Services)

22. Sony Music refers to and re-alleges each and every allegation contained in paragraphs 1 through 21, both inclusive, above, as if set forth herein.

23. Sony Music has performed any and all obligations to be performed by Sony Music, and satisfied any and all conditions to be satisfied by Sony Music, under the *Rock and Roll* License, or such performance and satisfaction have been excused by reason of Applebee's Services' breaches and repudiation.

24. Applebee's Services materially breached and repudiated the *Rock and Roll* License as alleged above, including by failing to pay Sony Music the license fee of the greater of $250,000 and the amount paid to music publishers for the right to use the musical composition *Rock and Roll*.

25. As a direct and proximate result of the foregoing breaches of contract, Sony Music has been damaged in the amount of at least $250,000, according to proof.

SECOND CLAIM FOR RELIEF

(For Breach of Contract – *Everybody Dance Now* License)

(Against Defendant Applebee's Services)

26. Sony Music refers to and re-alleges each and every allegation contained in paragraphs 1 through 21, both inclusive, above, as if set forth herein.

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27. Sony Music has performed any and all obligations to be performed by Sony Music, and satisfied any and all conditions to be satisfied by Sony Music, under the *Everybody Dance Now* License, or such performance and satisfaction have been excused by reason of Applebee's Services' breaches and repudiation.

28. Applebee's Services materially breached and repudiated the *Everybody Dance Now* License as alleged above and including by failing to pay Sony Music the license fee of the greater of $50,000 and the amount paid to music publishers for the right to use the musical composition *Everybody Dance Now*.

29. As a direct and proximate result of the foregoing breaches of contract, Sony Music has been damaged in the amount of at least $50,000, according to proof.

THIRD CLAIM FOR RELIEF

(For Direct, Contributory and Vicarious Copyright Infringement – *Rock and Roll*)

(Against All Defendants)

30. Sony Music refers to and re-alleges each and every allegation contained in paragraphs 1 through 21, both inclusive, above, as if set forth herein.

If there is a determination that a non-exclusive license was not granted for the use of the sound recording *Rock and Roll*, or if there was a non-exclusive license but defendants exploited *Rock and Roll* after Sony Music terminated the license or exploited *Rock and Roll* beyond the rights licensed, or all of the foregoing, then defendants have infringed Sony Music's copyright in the sound recording *Rock and Roll*:

(a) by, *inter alia* reproducing *Rock and Roll* in copies, by preparing derivative works based upon or incorporating *Rock and Roll*, by distributing copies of *Rock and Roll* to the public and/or by publicly performing *Rock and Roll*;

(b) by causing, inducing or purporting to authorize all or some of the foregoing infringements; and/or

(c) by failing to exercise defendants' control, authority or ability to avoid or cease the foregoing infringements and profiting therefrom.

31. Sony Music is entitled to and requests injunctive relief restraining defendants, and their respective officers, agents and employees, and all persons acting in concert with them, from engaging in any further acts in violation of the copyright laws.

32. Sony Music is further entitled to recover from defendants the damages Sony Music has sustained and will sustain, and all gains, direct and indirect profits and advantages obtained by defendants as a result of defendants' acts of infringement, or, at Sony Music's election, statutory damages of at least $150,000 against each defendant that is individually liable and statutory damages of at least $150,000 against each group of defendants that are jointly and severally liable, for their willful infringements, all according to proof.

FOURTH CLAIM FOR RELIEF

(For Direct, Contributory and Vicarious

Copyright Infringement – *Everybody Dance Now*)

(Against All Defendants)

33. Sony Music refers to and re-alleges each and every allegation contained in paragraphs 1 through 21, both inclusive, above, as if set forth herein.

34. If there is a determination that a non-exclusive license was not granted for the use of the sound recording *Everybody Dance Now*, or if there was a non-exclusive license but defendants exploited *Everybody Dance Now* after Sony Music terminated the license or exploited *Everybody Dance Now* beyond the rights licensed, or all of the foregoing, then defendants have infringed Sony Music's copyright in the sound recording *Everybody Dance Now*:

(a) by, *inter alia* reproducing *Everybody Dance Now* in copies, by preparing derivative works based upon or incorporating

Everybody Dance Now, by distributing copies of *Everybody Dance Now* to the public and/or by publicly performing *Everybody Dance Now*;

(b) by causing, inducing or purporting to authorize all or some of the foregoing infringements; and/or

(c) by failing to exercise defendants' control, authority or ability to avoid or cease the foregoing infringements and profiting therefrom.

35. Sony Music is entitled to and requests injunctive relief restraining defendants, and their respective officers, agents and employees, and all persons acting in concert with them, from engaging in any further acts in violation of the copyright laws.

36. Sony Music is further entitled to recover from defendants the damages Sony Music has sustained and will sustain, and all gains, direct and indirect profits and advantages obtained by defendants as a result of defendants' acts of infringement, all according to proof.

PRAYER

WHEREFORE, plaintiff Sony Music Entertainment prays for judgment as follows:

1. On the First Claim for breach of the *Rock and Roll* License, against defendant Applebee's Services, Inc., compensatory damages in the amount of at least $250,000, according to proof;

2. On the Second Claim for breach of the *Everybody Dance Now* License, against defendant Applebee's Services, Inc., compensatory damages in the amount of at least $50,000, according to proof;

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3. On the Third Claim for direct, contributory and vicarious infringement of the copyright in the sound recording *Rock and Roll*, against all defendants:

(a) That defendants, and each of them and their respective agents and servants, be enjoined during the pendency of this action and permanently from infringing, or contributing to the infringement of, plaintiff's copyrights in any manner, and from copying, selling, marketing, distributing, displaying or otherwise exploiting infringing copies or reproductions of any of plaintiff's copyrighted materials, and that defendants be required to deliver up to plaintiff all copies and other materials used in the making of infringing copies or reproductions;

(b) That defendants, and each of them, be required to pay plaintiff such damages as plaintiff has sustained in consequence of defendants' infringements of plaintiff's copyrights, including but not limited to the injury to the value of plaintiff's property, and all other damages sustained by plaintiff, and to account for and pay to plaintiff all gains, direct and indirect profits and advantages derived by defendants by reason of their infringements, or, at plaintiff's election, statutory damages of at least $150,000 against each defendant that is individually liable and statutory damages of at least $150,000 against each group of defendants that are jointly and severally liable, all according to proof;

4. On the Fourth Claim for direct, contributory and vicarious infringement of the copyright in the sound recording *Everybody Dance Now*, against all defendants:

(a) That defendants, and each of them and their respective agents and servants, be enjoined during the pendency of this action and permanently from infringing, or contributing to the infringement of, plaintiff's copyrights in any manner, and from copying, selling, marketing, distributing, displaying or otherwise exploiting infringing copies or reproductions of any of plaintiff's copyrighted materials, and that defendants be required to deliver up to plaintiff all copies and other materials used in the making of infringing copies or reproductions;

(b) That defendants, and each of them, be required to pay plaintiff such damages as plaintiff has sustained in consequence of defendants' infringements of plaintiff's copyrights, including but not limited to the injury to the value of plaintiff's property, and all other damages sustained by plaintiff, and to account for and pay to plaintiff all gains, direct and indirect profits and advantages derived by defendants by reason of their infringements, all according to proof;

5. For pre-judgment interest on all sums awarded;

6. For plaintiff's cost of suit and its attorney's fees; and

7. For such other and further relief as the Court deems just and proper.

Dated: April 28, 2017

/s/ Peter J. Anderson
Peter J. Anderson, Esq.
LAW OFFICES OF PETER J. ANDERSON
A Professional Corporation
Attorney for Plaintiff
SONY MUSIC ENTERTAINMENT

DEMAND FOR JURY TRIAL

Plaintiff Sony Music Entertainment respectfully requests trial by jury.

Dated: April 28, 2017

/s/ Peter J. Anderson

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SONY MUSIC ENTERTAINMENT